92-980

Supreme Court, U.S.
FILED
DEC 10 1992
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CHARLES J. HOLT.
Petitioner,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,
Michigan State Industries,
Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the lower court judgment in this case finding that the recently enacted Civil Rights Act of 1991 does not apply retroactive conflict with prior decisions of this court and other circuits?

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NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

December Term, 1992

CHARLES HOLT,

Petitioner,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,
Michigan State Industries,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NOW COMES petitioner, CHARLES HOLT, acting in pro se, and respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States court of Appeals for the Sixth Circuit declining to apply the recently enacted Civil Rights Act of 1991, retroactively to the instant case.

## OPINIONS

The opinion of the Court of Appeal is reported as Charles Holt v. Michigan Department of Corrections, Michigan State Industries, _____ F.2d _____ (6th Cir. 1992) (Docket No: 91-2034, decided September 11,1992), and appears herewith in Appendix "A" to this petition. The written opinion of the District Court for the Western District of Michigan appears in Appendix "B" to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 11, 1992. This Petition for Certiorari is made within ninety days of that date. The jurisdiction of this Honorable court is invoked under 28 U.S.C. 1254 (1), and pursuant to Rule 10(a) of this court's Rules of Practice and Procedure.

## STATUTORY PROVISION INVOLVED

42 U.S. C. 1981, as amended by the Civil Rights Act of 1991, provides in pertinent part, as follows:

> (a) All persons within the jurisdiction of the United State shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all the laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of state law.

## STATEMENT OF THE CASE

The United States District Court, Western District of Michigan, had jurisdiction pursuant to Title 42 U.S.C. 1981, et seq.

Petitioner, CHARLES HOLT, is a state classified civil servant who occupies a position in the bureau of Michigan State Industries (MSI) in the Michigan Department of Corrections. On October 26, 1990, Petitioner filed a pro se complaint under the Civil Rights Act of 1866, 42 U.S.C. 1981, in the United States District Court for the Western District of Michigan. The complaint alleged that Respondents Michigan Department of corrections and Michigan State Industries discriminated against him and other African-American employees in hirings, job training, and promotions to upper-management levels because of his race and that he and other African-American employees have been subjected to racial harassment. As relief, Petitioner sought monetary damages and prospective injunctive relief.

On April 15, 1991, before discovery could be initiated and completed, Respondents moved for summary judgment. In that motion, Respondents argued that the Eleventh Amendment completely barred Petitioner from obtaining any relief; that the applicable statue of

limitations had lapsed, and that the alleged discrimination in job hirings, job training, and in promotions to upper-management positions was not cognizable under 42 U.S.C. 1981 as interpreted in Patterson v. McLean Credit Union, 491 U.S. 164; 109 S. Ct 2363; 105 L Ed. 2d 132 (1989).

On May 13,1991, Petitioner moved for leave to amend the complaint. The amended complaint sought to name eight individual defendants whom Petitioner alleged knowingly and intentionally discriminated against him and other African-American employees in job hirings, job training, and promotions to upper-management levels within the Michigan State Industries section of the Department of Corrections.

On May 31, 1991, Chief Judge Benjamin F. Gibson issued an opinion granting Respondents motion for summary judgment and denying Petitioners motion to amend the complaint. In his opinion, Judge Gibson considered whether the proposed injunctive relief could be brought against individual state officials. However, in light of Patterson's narrow interpretation of 42 U.S.C. 1981 claims, injunctive relief was denied as well.

On June 18, 1991, Petitioner filed his motion for reconsideration, and on August 6, 1991, the District Court issued an order denying reconsideration.

On September 4, 1991, Petitioner filed a Notice of appeal from the judgment entered by the District Court.

While this case was pending on appeal, on November 21, 1991, President Bush signed the Civil Rights Act of 1991, into law. 1/ The

Sixth Circuit Court of Appeals ruled that the 1991 Act is not to be applied retroactively, and without addressing the other issues raised by Petitioner, affirmed the district court judgment.

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1/ On appeal Respondents conceded in their brief (p., 15) that if the Civil Rights Act of 1991 were applied retroactive, Petitioner would have a valid claim under 42 U.S.C. 1981.

## REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be issued in this case for the following reasons: The instant petition presents an issue of apparent conflict of opinion in several of the lower courts concerning the application of the recent civil Rights Act of 1991. Although this Honorable court has previously ruled that lower courts "must apply the law in effect at the time it renders its decision" Bradley v. Richmond School Board, 416 U.S. 696 (1974); and despite this court's action in the recent case of Hicks v. Brown Group., Inc., _____ U.S. _____; 112 S Ct 1255 (1992), which at least implicitly, though not specifically and unequivocally, reaffirmed the Bradley principle; various lower courts, including the Sixth circuit, have split on Bradley's validity due to the decision by this Court in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

Because of this Court's apparent inconsistent decisions in Bradley and Bowen, several circuits have rendered inconsistent and completely opposite decisions on how to apply the Civil Rights Act of 1991.

## LAW AND ARGUMENT

In Hicks v. Brown Group, Inc., supra, the plaintiff filed a civil

rights action alleging racial discrimination against his former employer. In October, 1988, the District Court entered judgment for Hicks following a jury trial. In April, 1990, the Court of Appeals for the Eighth Circuit affirmed the judgment of the district Court in a published decision entitled Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990). In March, 1991, this Court vacated the Eighth Circuit judgment in Hicks 111 S. Ct. 1299; 113 L Ed.2d 234, and remanded the case for further consideration in light of Taggart v. Jefferson County Child Support Unit, 915 F.2d 396 (8th Cir. 1990) In June, 1991, the Eighth Circuit made their decision in the Taggart case holding that the decision in Patterson v. McLean Credit Union, supra, precluded Hicks from suing his former employer for discriminatory discharge under 42 U.S.C. 1981. Following this decision, in October, 1991, Hicks filed a motion to vacate the ruling of the Eighth Circuit. In that motion, Hicks argued that the Patterson decision had been effectively overruled by the Civil Rights Act of 1991, and that the 1991 Act should be applied retroactively to his 1988 discrimination claims against his former employer Brown Group, Inc. The eighth Circuit ruled that the motion to vacate judgment was untimely filed and recommended that the matter should go back to this Court for review. Hicks v. Brown Group, Inc., 952 F.2d 991, at 992.

On writ of certiorari, this Court vacated the judgment of the Eighth Circuit in Hicks and remanded for further consideration in light of the civil Rights Act of 1991. 112 S. Ct. 1255:

> "March 2, 1992. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the Civil Rights Act of 1991. 112 S. Ct 1255.

While this Court did not specifically and unequivocally decide that Hicks could properly premise his employment discrimination claims upon the 1991 Act, the implication, however, does suggest that this Court's previous decision in Bradley v. Richmond School Board, supra, is still vital law and that the Civil Rights Act of 1991 should, at a minimum, be applied retroactively to those cases pending in the appellate pipe-line. It is very unlikely that this Honorable Court would "vacate" the judgment in Hicks v. Brown Group, Inc., supra, just for the sake of doing it. This Court was obviously satisfied that Hicks could put forth a viable argument for retroactive application of the Civil Rights Act of 1991.

Even assuming arguendo, that Hicks does not stand for the proposition that this Court's Bradley decision is still vital law and that the Civil Rights Act of 1991 should be applied retroactively: there is still a conflict among the lower courts on how to apply the Act. This differing in lower court opinion and inconsistency in the application of the Civil Rights Act should be resolved by this Court.

Petitioner has located at least fifty-three opinions from various lower courts dealing with the retroactively -verses- prospectivity of the Civil Rights Act of 1991. From these opinions, there are over twenty published opinions finding the Act retroactive with an equal number of opinions finding the Act prospective.

The reason for the split of authority in the lower courts is readily apparent. In Thrope v. Housing Authority of the City of Durham, 393 U.S. 268; 89 S. Ct 518; 21 L Ed.2d 474 (1969), and again in Bradley v Richmond School Board, 416 U.S. 696; 94 S. Ct 2006; 40 L Ed.2d 476 (1974), the Court articulated the proposition that "a lower court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id., 711.

In sharp contrast to Bradley, this court in the case of Bowen v. Georgetown University Hospital, 488 U.S. 204, 208; 109 S. Ct. 468, 471; 102 L Ed.2d 493 )1988), reiterated the long-standing principle that "retroactively is not favored in law .. and congressional enactments .. will not be construed to have retroactive effect unless their language requires this result."

While this Court has acknowledge this apparent tension between Thrope - Bradley and Bowen (see Kaiser v Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990); no action has been taken to settle the controversy which has now caused much confusion and conflict in the lower courts.

Currently, those lower courts which follow the Thrope - Bradley line of cases have correctly ruled that the Civil Rights Act of 1991 is to be applied retroactive. A partial list of those opinions finding the Act retroactive include the following cases.

Lee v. Sullivan, 787 F. Supp. 921 (N.D. Cal 1992); Andrade v. Crawford & Co., 786 F. Supp. 1302 (N.D. Oh. 1992); Sample v. Keystone Carbon Co., 786 F. Supp. 527 (W.D. Pa. 1992); United States v. Department of Mental Health, 785 F. Supp. 846 (E.D. Cal.



1992); Poston v. Reliable Drug Stores, Inc., 783 F. Supp. 1166 (S.D. Ind. 1992); Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. 1992); Watkins v. Bessemer State Tech. Coll., 782 F. Supp. 581 (N.D. Ala.. 1992); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. 1992); Long v Carr, 784 F. Supp. 887 (N.D. Ga. 1992); Graham v. Bodine Electric Co., 782 F. Supp 74 (N.D. Ill. 1992); Bristow v. Drake Street, Inc., 1992 WL 14262 (N.D. Ill. Jan. 21, 1992); Goldsmith v. City of Atmore, 782 F. Supp. 106 (S.D. Ala.. 1992); Guuess v. City of Portage, 1992 WL 8722 (N.D. Jan. 14,1992) (unreported); Saltarikas v. Charter Mfg. Co., 782 F. Supp. 420 (E.D. Wis. 1992); Stender v. Lucky Stores, Inc., 780 F. Supp 1302 (N.D. Cal. 1992); King v. Shelby Medical Center, 779 F. Supp. 157 (N.D. Ala. 1991); Davis v. Tri-State Mack Dist., Inc., 1991 WL 316891, 1991 U.S. Dist. LEXIS 19380 (E.D. Ark. Dec 16, 1991) (unreported); La Cour v Harris County, 1991 WL 321020, 1991 U.S. Dist. LEXIS 19223 (S.D. Tex. Dec. 6, 1991) (unreported), and Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991).

On the other hand, those lower courts which have relied upon this Court's Bowen decision have held the Act prospective:

Charles Holt v. Michigan Department of Corrections, _____ F.2d _____ (6th Cir. 1992, decided September 11,1992 (the instant case); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. 1992); McCormick v. Consolidation Coal Co., 786 F. Supp. 563 (N.D. W.Va. 1992); Hatcher-Capers v Haley, 786 F. Supp 1054 (D.D.C. 1992); Rowson v. County of Arlington, 786 F. Supp. 555 (E.D. Va. 1992); Reynolds v. Frank, 786 F. Supp. 168 (D. Conn.. 1992); Sofferin v. American Airlines, 785 F. Supp. 780 (N.D. Ill. 1992); Guillory-Wuerz v. Brady,

785 F. Supp 889 (D. Colo. 1992); McLaughlin v. State of New York, 784 F. Supp. 961 (S.D. N.Y. 1992); Toney v. State of Alabama, 784 F. Supp. 1542 (M.D. Ala.. 1992); McCullouch v. Consolidated Rail Corp. 785 F. Supp. 1309 (N.D. Ill. 1992); Hameister v. Harley-Davidson, Inc., 785 F. Supp. 113 (E.D. Wis. 1992); Percell v. International Business Machines, Inc., 785 F. Supp. 1229 (E.D. N.C. 1992); Stenle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. 1992); Cook v. Foster Forbes Glass, 783 F. Supp. 1217 (E.D. Mo. 1992); Thompson v. Johnson & Mgmt. Info. Ctr., 783 F. Supp. 893 (D. N.J. 1992); Patterson v. McLean Credit Union, 784 F. Supp. 268 (M.D.. N.C. 1992); Kimble v. DPCE, Inc., 784 F. Supp. 250 (E.D. Pa. 1992); Tyree v. Riley, 783 F. Supp. 877 (D.M.J. 1992)

The only common trend between these conflicting opinions is apparent. Those lower courts which have relied on Thrope v. Housing Authority of the City of Durham, 393 U.S. 268; 89 S. Ct. 518;21 L Ed.2d 474 (1969) and Bradley v. Richmond School Board, 416 U.S. 696; 94 S. Ct 2006; 40 L Ed.2d 476 (1974), have ruled the Civil Rights Act of 1991 retroactive, while those cases which have relied upon Bowen v. Georgetown University Hospital, 488 U.S. 204, 208; 109 S. Ct. 468, 471; 102 L Ed.2d 493 (1988), have ruled the Act prospective.

In Petitioner's opinion the better viewed decisions have ruled the Act retroactive. The majority of these opinions have concluded that the Act did not alter the substantial rights of the parties, was procedural in nature, reaffirmed existing laws, and was more of a Congressional interpretation of what was meant when the original Act was enacted. See Graham v. Bodine Elec. Co., 782 F. Supp. 74, 75-77 (N.D. Ill. 1992), Goldsmith v. City of Atmore, 782 F. Supp. 106, 107-108 (S.D. Ala.. 1992); King v Shelby Medical Center, 779 F. Supp. 157, 158-159 (N.D. Ala. 1991).

Up to this point in the instant litigation, Respondents have not alleged any manifest injustice or substantial disadvantage by retroactive application of the Act. Respondents only argument seems to be that the Act should not be applied retroactively because Patterson precluded this type of discrimination claim from being raised under 42 U.S.C. 1981. What Respondents have failed to admit is that the type of racial activity alleged in this case has long been held unconstitutional and unlawful and pursuant to Title VII, or under 42 U.S.C. 1983, 42 U.S.C. 1985, civil liability was always possible even under the Patterson era.

Hence, no substantial rights of Respondents are either forfeited or diminished under the Civil Rights Act of 1991. The Act merely reiterated the intent of congress in light of the decision in Patterson. The Act merely reaffirmed remedies that were readily available before this Court announced the decision in Patterson and is procedural in nature.

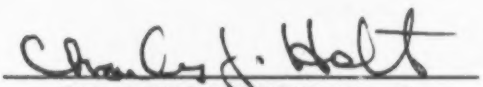
Accordingly, this Court should vacate the lower court judgment in the instant case just as it did in Hicks v. Brown Group, Inc., and remand for reconsideration in light of the Civil Rights Act of 1991.

This Court should grant certiorari here to explicitly rule that the Civil Rights Act of 1991 is a procedural implementation by congress which effectively interprets the original Act, 42 U.S.C. 1981, to include the very type of complaints raised by this Petitioner and applies retroactively to those cases pending in the appellate pipe-line, and further, to resolve the conflict between the circuits created by the decision in Bowen v. Georgetown University Hospital, supra.

## CONCLUSION

For the reason set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals in this case. 2/

DATED: November 6, 1992. Respectfully Submitted,



CHARLES HOLT In Pro Se

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2/ If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for re-determination in light of Hicks v. Brown Group, Inc., 112 S Ct 1255 (1992).

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-2034

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

CHARLES HOLT,
Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS, MICHIGAN STATE INDUSTRIES,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Michigan

Decided and Filed September 11,1992

Before: MERRITT, Chief Judge; MILBURN and GUY, Circuit Judges.

MERRITT, chief Judge. The plaintiff, Charles Holt, appeals the district court's summary judgment in favor of the defendants in this employment discrimination action brought under 42 U.S.C § 1981. For the reasons that follow, we affirm.

I.

Holt, a civil service employee, is employed by Michigan State Industries, a bureau of the Michigan Department of Corrections. Michigan State Industries operates about 39 factories in Michigan prisons. The factories produce a variety of goods, from furniture to clothing. Holt was hired by Michigan State Industries in 1985. he began as a level V supervisor in the shoe factory at the State Prison of Southern Michigan, where he supervised prisoners who worked in the factory. He has been trans-

ferred twice to different factories in different prisons. Currently, Holt works as a production supervisor at the Cotton Garment Factory in the Carson City facility. Holt remains a level V supervisor. In the years between 1982 and 1989 Holt sought, but was denied, promotions to higher level supervisory positions. Promotion to a level VI supervisor, for example, would enable Holt to supervise not just prisoners, but also nonprisoners in the company's factories.

Eschewing state remedies, Holt filed a § 1981 action in federal district court. In his pro se complaint, Holt, an African-American, contends that he was unilaterally transferred and demoted from different jobs, denied access to skilled and semi-skilled training, prevented from exercising his seniority, and refused promotion to higher level supervisory jobs on account of his race. He claims that Michigan State Industries "engages in a pattern and practice of racial discrimination" in job placement and training. In support of his complaint, Holt alleges that the vast majority of salaried African-American employees at Michigan State Industries are concentrated in low level jobs and, unlike their white counterparts, are given little opportunity for advancement.[1] With respect to his failure-to-promote claim, Holt seeks monetary damages and injunctive relief. The defendants contend that Holt "has never been promoted because he has not been the most qualified person for the open job."

The district court dismissed the portions of Holt's complaint seeking monetary relief. The court held that the Eleventh Amendment barred Holt from suing his own state in a federal court for damages. The district court granted summary judgment for the defendants on those claims for which Holt sought injunctive relief. The court relied on Patterson v. McLean Credit Union, 491 U.S. 164 (1989), overruled by Civil Rights Act of 1991, P.L. 102-166. In Patterson, the Supreme Court held that an employee's claim of racial harassment relating to the conditions of employment is not actionable under § 1981 because the provi-

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[1]Michigan State Industries admits that there are no African-American employees in its Personnel Department, Sales Department, and Warehouse, and that there are no African-American sales managers or level VI supervisors. The defendants, however, note that the director of Michigan's Department of Corrections is African-American.

sion does not apply to conduct which occurs after formation of a contract and which does not interfere with the right to enforce established contract obligations. The court found that Holt's allegations involved post-information conduct on the part of his employer. Holt, proceeding pro se, appeals the summary judgment dismissal of his claims.

II.

Because Congress overturned Patterson after the district court decided this case, we must first determine whether the Civil Rights Act of 1991 applies retroactively. We hold that the Civil Rights Act of 1991 does not apply retroactively, that Patterson controls this case, and that Patterson precludes the plaintiff's claims. We need not reach the Eleventh Amendment question briefed by both parties.

A. Nonretroactivity of the Civil Rights Act of 1991

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Under the short-lived Patterson regime, § 1981 protected only the right to make employment contracts and the right to enforce such contracts through the courts. The Patterson Court held that § 1981 does not apply to discrimination the conditions of employment. Thus, under Patterson, an employer's racially discriminatory conduct occurring after the formation of the employment contract is not actionable under § 1981. The Court, however, recognized that a failure-to-promote claim may be actionable under § 1981, but "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." 491 U.S. at 185-86.

The Civil Rights Act of 1991 overruled the Patterson decision. The defendants acknowledge that the Act greatly expands the coverage of § 1981 and "arguably includes[s] situations like that in the instant matter that occur after the effective date of the act." Brief of Appellee at 11. In other words, were Holt to file a claim tomorrow alleging discriminatory conduct by Michigan State Industries occurring after November 21, 1991 - the effective date of the Act - his claim would be viable under § 1981. In this case, however, the employer's alleged conduct occurred prior to the Act. The defendants thus argue that the Civil Rights Act should not be applied retroactively.

Sixth Circuit precedent supports the defendants' contention. In Vogel v. City of Cincinnati, 959 F.2d 596 (6th Cir. 1992) , this circuit held that the Civil Rights Act of 1991 does not apply retroactively to conduct that occurred before the Act became law. Id. at 597-89. The Fifth, Seventh and Eighth Circuits have followed suit. See Johnson v. Uncle Ben's Inc., No. 91-2590, 1992 U.S. App. LEXIS 14931 (5th Cir. July 1,1992); Mozee v American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). See also Fray, app. at 1383 (listing district courts refusing to apply Act retroactively).

Several courts have discussed why the Civil Rights Act of 1991 should not apply to claims arising before and during Patterson's reign. The courts' reasoning can be summarizes as follows. Courts must first look to the statute itself to determine whether Congress, through the statute, spoke to the issue of retroactively. "[W]here the congressional intent is clear, it governs." Kaiser Aluminum & Chemical Corp. v. Bonjormo, 494 U.S. 827, 837 (1990). The Act in question is silent on this matter. If the statute's language is unhelpful, then courts must try to discern congressional intent by looking to the statute's legislative history. The legislative history of the Act reveals that Congressional Democrats and Republicans could not agree on whether the Act should be applied retroactively or merely prospectively. As a result, Congress "dumped the question in the judiciary's lap without guidance." Luddington v. Indiana Bell Tel. Co., 1992 U.S. App. LEXIS No. 91-2320 (7th Cir. June 15,1992) at 5.

Added to this congressional indecision is judicial inconsistency over whether a statue should be given retroactive or prospective effect in the absence of clear congressional intent.. Compare Bradley v. School board of City of Richmond, 416 U.S. 696 (1974) (courts are to apply the law in effect at the time a court renders its decision unless such application results in manifest injustice or runs contrary to congressional intent) with Bowen. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (statute does not apply retroactively unless it language requires it.) See generally Kaiser, 494 U.S. at 841 (Scalia, J., concurring (examining the two lines of retroactively cases and pronouncing those two lines "in irreconcilable contradiction.").

Against this unfortunate background, Judge Posner of the Seventh Circuit offers a sound explanation why the Civil Rights Act of 1991 should not apply retroactively.

> The idea that the law should confine its prohibitions and regulations to future conduct, so that the person subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of the traditional conception of the "rule of law." Except as codified in constitutional provision ... the traditional conception is neither immutable nor absolute. But we think that conformity to it is the right policy for courts to following default of other guidance.

Luddington at 6-7. This Circuit follows a rule consistent with Judge Posner's reasoning and conclusion. Because the conduct complained of by Holt occurred prior to the promulgation of the Civil Rights Act of 1991, we apply Patterson to the facts of this case.

B. Patterson's Failure-to-Promote Exception.

Patterson precludes an action under § 1981 relating to the conditions of employment unless the claim involves a discriminatory failure-to-promote where the nature of the change in positions was such that it involved the opportunity to enter into a new contract with the employer.

In the language of Patterson, a failure-to-promote claims actionable under § 1981 only where the promotion rises "to the level of an opportunity for a new and distinct relation between the employee and the employer." Patterson, 491 U.S. at 185. This case does not fit Patterson's failure-to-promote exception.

The district court found that Holt' desired promotions would involve simply more responsibility for the production of goods manufactured by Michigan State Industries and, presumably, increase pay and benefits

The district court held, therefore, that the desired promotions did not rise "to the level of an opportunity for a new and distinct relation between the employee and the employer." See Patterson, 491 U.S. at 185-86. The district court contrasted Holt's situation with that of the employee in Hishon v. King & Spaulding, 467 U.S. 69 (1984), a case cited by the Patterson court (with a "Cf." signal) in conjunction with its discussion of the "a new and distinct relation" standard. In Hishon, a Title VII case, a law firm refused to promote an associate attorney, a woman, to the position of partner. Apparently, the Court's reference to Hishon indicates that, in the Court's view, an employer's failure to promote an employee from law firm associate to partner constitutes a "new and distinct" employment relation actionable under § 1981.

The defendants acknowledge that some district courts in the Sixth Circuit have construed Patterson's "new and distinct relation" standard "fairly broadly." Brief of Appellee at 15. That is to say, some courts have viewed Hishon's facts to fall somewhere in the middle of a continuum of employment scenarios that give rise to "new and distinct" employment relations.

To be sure, Patterson's "new and distinct relation" standard admits of no simple, bright-line test. A review of cases interpreting Patterson discloses that court have had to undertake subtle, sometimes hairsplitting analyses to determine whether a change in employment constitutes a "new and distinct relation." The case at hand, however, is not so taxing. Holt seeks to move from one supervisory position (level V) to another (level VI). Though such a move brings with it increased responsibilities -

for example, overseeing non-prisoner workers – and a potential pay increase, such a move constitutes an incremental change in employment of the type nearly all courts have found insufficient to establish a claim under Patterson. Holt's sought-after promotion and differs in degree and kind from a promotion from a non-supervisory to a supervisory post, or a change from an hourly wage or commission-based salary to a weekly or annual salary – employment scenarios most courts have deemed actionable under Patterson. See generally Taylor v. Western & Southern Life Ins. Co., Nos. 90-3859, 91-1057, 1992 U.S. App. LEXIS 15706 (7th Cir. July 13, 1992). While the facts of Hishon do not define the entire scope of Patterson's "new an distinct" relation standard, we decline to extend that standard to encompass the facts of this case.

Accordingly, we hold that Holt's desired promotion, standing alone, would not constitute a "new and distinct relation" between employee and employer within the meaning of Patterson. Holt's complaint, in other words, doesn't establish a failure-to-promote claim under § 1981. We therefore affirm the district court's summary judgment because no genuine issue of material exists and the defendants are entitled to judgment as a matter of law. See Canderm Pharmaceuticals, Ltd. v Elder Pharmaceuticals, Inc. 862 F. 2d 597, 601 (6th Cir. 1988).

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

CHARLES J. HOLT,
Plaintiff,
Gibson

v

MICHIGAN DEPARTMENT OF CORRECTIONS and MICHIGAN STATE INDUSTRIES,
Defendants.

Civil No. 1:90-CV-904
Hon. Benjamin F.

JUDGMENT

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At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 31st day of May, 1992.

PRESENTED: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE.

In accordance with the Opinion dated May 31,1991, IT IS HEREBY ORDERED that defendants' motion for summary judgment is GRANTED and that the plaintiff's complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED that all other pending motions are DENIED.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

CHARLES J. HOLT,
Plaintiff,
Gibson

v

MICHIGAN DEPARTMENT OF CORRECTIONS and MICHIGAN STATE INDUSTRIES,
Defendants.

Civil No. 1:90-CV-904
Hon. Benjamin F.

**OPINION**

---

I.

Defendant Michigan State Industries ("MSI") is a bureau of the Michigan Department of Corrections and is responsible for operating a number of factories in the prisons of this state. Plaintiff Charles J. Holt is employed by MSI as a production supervisor. He alleges that MSI discriminates against minorities in its selection of employees for promotion to higher-level positions. As a result, he brings suit under Title 42 United States code Section 1981 seeking monetary and injunctive relief. Pending before the court is the defendants' motion for summary judgment.

II.

Summary judgment is appropriate only where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc. (In re Atlas concrete Pipe, Inc.), 668 F.2d 905, 908 (6th

Cir. 1982). There is no material issue of fact for trial unless, in viewing the evidence in favor of the nonmoving party, a reasonable factfinder could return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once this has been done, the nonmoving party must come forward with specific facts showing that there is a material issue of fact on an issue which the nonmoving party will bear the burden of proof at trial. Fed. Rd. Div. P. 56(e); Celotex, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. Id.

III.

Unless congress provides otherwise, the Eleventh Amendment prohibits a citizen from suing his own state in a federal court for monetary damages under either the Constitution or federal law. E.G., Pennhust State School & Hosp. v Halderman, 465 U.S. 88, 100 (1984). Congress did not abrogate a state's immunity from suit when it enacted Section 1981. Freeman v. Michigan Dept. of State, 808 F.2d 1174, 1178-79 (6th Cir. 1987). Accordingly, the portions of the complaint seeking monetary relief are dismissed.

In addition to monetary damages, the plaintiff also seeks injunctive relief. As a general rule, actions against a state officer in his or her official capacity for injunctive relief are not prohibited by the Eleventh Amendment.[1] Will v. Michigan Dept. of State Police, 49 U.S. 58, 71 n.10 (1989); Ex parte Young, 209 U.S. 123, 159-60 (1908). While the



Supreme court has not addressed the issue of whether the Eleventh Amendment prohibits a plaintiff from seeking injunctive relief under Section 1981 against a state official, the Sixth Circuit has suggested that such relief may be available. Freeman, 808 F.2d at 1180. Therefore, this court will assume that such relief is available.

In general, Section 1981 prohibits discrimination in the making and enforcement of contracts. Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989). Post -information conduct, including discriminatory conduct on the part of an employer, doesn't involve the right to make a contract, "but rather implicates the performance of established contractual obligations . . ." Id. at 177. Therefore, the failure of an employer to promote an individual due to his or her race is actionable under Section 1981 "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer ..." Id. at 185-86.

No post-Patterson Sixth Circuit decision has clearly articulated what factors are to be considered by a court faced with the allegation that the failure of an employer to promote a particular employee is cognizable under Section 1981.

Nevertheless, this Court believes that the exception noted by the Supreme Court in Patterson should be construed narrowly in order to prevent Section 1981 from emasculating Title VII of the Civil Rights Act of 1964 ("Title VII".

An employer's failure to promote an employee on account of his race is actionable under Title VII. However, unlike Section 1981, Title VII contains an elaborated administrative scheme that a plaintiff must exhaust prior to seeking redress in a judicial forum. 42 U.S.C. § 2000e-5(b), (f) (1). Moreover, a Section 1981 litigant, unlike his or her Title VII counterpart, may receive monetary damages, including punitive damages, to compensate for any mental anguish or pain or suffering that the discriminatory act may have caused. Patterson, 491 U.S. at

211 (Brennan, J., dissenting); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460(1975). Unlike Title VII actions, claims alleging a violation of Section 1981 may be tried before a jury. Patterson, 491 U.S. at 211 (Brennan, J., dissenting). Courts should be reluctant to give a broad reading to an earlier statute if it would result in the circumvention of the comprehensive remedial scheme provided by a later statute. Patterson, 491 U.S. at 181. See also United States v. Fausto, 484 U.S. 439 (1988).

Therefore, this court believes that the "failure-to-promote" exception to the general rule that an employer's post-information conduct is not actionable under Section 1981 should be interpreted narrowly to avoid rendering Title VII meaningless.

Moreover, this Court finds significant that the Patterson Court, after noting the existence of Section 1981's "failure-to-promote" exception, immediately cited Hishon v. King & Spaulding, 467 U.S. 69 (1984), a case holding that the refusal of a law firm to give a partnership to an associate is actionable under Title VII. See also Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989). The reference to Hishon suggests an intent on the part of the Patterson court to limit the "failure-to-promote" exception to those situations involving a fundamental and distinct change in the contractual relationship between the employer and the employee that is similar to the change that accompanies a promotion from associate to partner in a law firm setting. Sofferin v. American Airlines, Inc., 717 F. Supp. 597, 599 (N.D. Ill. 1989). for this reason, the Court holds that Section 1981's "failure-to-promote" exception is so limited.

One decision from the Eastern District of Michigan, after reviewing the decisions of other district courts, has concluded that a balancing test involving a variety of factors is to be applied by courts faced with the allegation that an employer's failure to promote states a cause of action under Section 1981. Among these factors are: changes inapt,

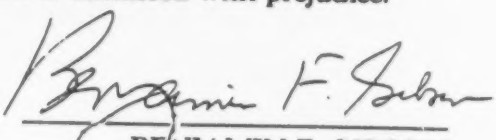
in duties and responsibilities, in status from hourly to salaried employee, in required qualifications, in responsibility level, in daily duties, in potential liability, and in pension and other benefits. Hudgens v. Harper-Grace Hosps., 728 F. Supp. 1321, 1325-26 (E.D. Mich. 1990). When balancing these factors, this test requires a court to consider the number of factors affected by the promotion, the magnitude of the individual changes and the effect of the changes as a whole. Id.

This Court believes these factors provide an excellent basis for determining whether a fundamental and distinct change in the contractual relationship between the employer and the employee would have occurred if the employee would have been promoted. However, a court utilizing them should be mindful that "garden-variety" promotions involving simply more responsibility or better pay and benefit are not actionable under Section 1981. Otherwise, the emasculation of Title VII that so concerned the Patterson court would be accomplished.

After reviewing the complaint and the portions of the record submitted by the parties to support their respective positions, this court holds that the plaintiff's allegations fail to fail within Patterson's narrow "failure-to-promote" exception. The plaintiff maintains that minorities employed by MSI have not been promoted above the level of Industrial Supervisor - Level V, his current employment classification. Complaint, ¶¶ 11, 28, 30, 32. In effect, the plaintiff alleges that he has not been permitted to advance to a higher level because of his race. This higher level would involve simply more responsibility for the production of goods manufactured by MSI and presumably, increased pay and benefits. Such allegations involve "garden-variety" promotions and are not akin to the promotion from associate to partner in a law firm setting. Therefore, the portions of the complaint seeking injunctive relief are dismissed as well.

IV

For the reasons stated above, the defendants' motion for summary judgment is granted and the complaint is dismissed with prejudice.



BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: May 31,1991

## FOOTNOTE

1. A proposed amended complaint filed by the plaintiff in response to the defendants' motion for summary judgment adds individual state officials as defendants. Therefore, the Court will address the merits of the plaintiff's request of injunctive relief.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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CHARLES J. HOLT,
Plaintiff,
Gibson

v

MICHIGAN DEPARTMENT OF

CORRECTIONS and MICHIGAN STATE INDUSTRIES,
Defendants.

Civil No. 1:90-CV-904
Hon. Benjamin F.

**MEMORANDUM OPINION and ORDER**

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At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 6th day of August, 1991.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

Plaintiff seeks reconsideration of this Court's Opinion and Judgment granting the defendant's motion for summary judgment on his complaint alleging that a violation of Title 42 United States Code Section 1981 has occurred because of the defendants' reluctance to promote minorities. In its Opinion, the Court noted that the failure to promote an individual due to his or her race is actionable under Section 1981 "[o]nly where the promotion rises to the level of an

opportunity for a new and distinct relation between the employee and the employer . . ." Patterson v. McLean Credit Union, 491 U.S. 164, 185-86 (1989). This language led the Court to conclude that an employer's "failure-to-promote" would be actionable under Section 1981 only if the situation involved a fundamental and distinct change in the contractual relationship between the employer and the employee.

See Sofferin v. American Airlines, Inc., 717 F. Supp. 597, 599 (N.D. Ill. 1989). See also Hishon v. King & Spaulding, 467 U.S. 69 (1984). Since the promotions that were allegedly wrongfully withheld from the plaintiff could not be characterized as "fundamental and distinct change in the contractual relationship," the complaint was dismissed. The arguments presented by the plaintiff's motion for reconsideration do not cast doubt on the Court's earlier conclusion.

Therefore, IT IS HEREBY ORDERED that plaintiff Charles J. Holt's motion for reconsideration (Pleading No. 36) is DENIED.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE